ORIGINAL

83-6459

No.A-719

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHNNY LUKE,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Alabama.

Margaret Young Brown
Counsel for Petitioner
214 North College Street
Auburn, Alabama 36830

Floyd L. Likins, Jr.
Counsel of Record.
801 South Railroad Avenue
Post Office Box 2142
Opelika, Alabama 36903

March 20, 1984

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No.A-719

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHNNY LUKE,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Alabama.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Johnny Luke, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama entered in the above-entitled case on September 30, 1983 with rehearing denied on December 22, 1983.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals is unreported and is attached in Appendix A hereto. The opinion of the Supreme Court of Alabama is unreported and is attached in Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on September 30, 1983, a timely petition for rehearing was denied on December 22, 1983, the jurisdiction of this Court is invoked under 28 USC 1257, and Article III of the United States Constitution.

QUESTIONS PRESENTED

1. a. WHETHER THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY SUFFICIENT TO PROVE ROBBERY IN THE FIRST DEGREE OR AN ATTEMPPT THEREOF, THUS BRINGING THE DEFENDANT WITHIN THE AMBIT OF §13A-5-40(a)2, Code of Alabama, 1975?

   b. WHETHER THE DEATH PENALTY IS APPROPRIATE IN THIS CASE, WHERE THE ONLY AGGRAVATING CIRCUMSTANCE INVOLVED IS THE COMMISSION OF AN ATTEMPT TO ROB, AND THE ONLY EVIDENCE OF SUCH AN ATTEMPT WAS THROUGH CONFLICTING STATEMENTS?

   c. WHETHER THE IMPOSITION OF THE DEATH PENALTY DENIED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE 5th, 8th AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION?

2. WHETHER IN LIGHT OF THE LACK OF PROOF OF THE AGGRAVATING CIRCUMSTANCE AND UNDERLYING CHARGE OF ROBBERY, OR ATTEMPTED ROBBERY, IN THE FIRST DEGREE, THE MITIGATING CIRCUMSTANCE MANDATED A LESSER SENTENCE THAN DEATH?

STATUTES INVOLVED

1. UNITED STATES CONSTITUTION:

   a. 5th Amendment,

   "No person shall be . . . deprived of life liberty or property, without due process of law . . ."

   b. 8th Amendment,

   "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

   c. 14th Amendment.

   "[n]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. CODE OF ALABAMA, 1975.

   a. §13A-5-40(a)(2),

   "(a) The following are capital offenses:
   (2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;"

   b. §13A-4-2(d)(2),

   "(d) An attempt is a:
   (2) Class B felony if the offense attempted is a Class A felony."

   c. §13A-6-2(a)(3),

   "(a) A person commits the crime of murder if:
   (3) He commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he is committing or attempting to commit, or in immediate flight therefrom, he, or another participant if there be any, causes the death of any person."

STATEMENT OF THE CASE

The Petitioner was indicted on August 25, 1982, by the Grand Jury of Russell County, Alabama, on the charge of Murder during a Robbery in the First Degree (R. 429 & 430). On September 8, 1982, the Petitioner was arraigned and pleaded not guilty (R. 434). On September 13, 1982, the Petitioner filed a petition for psychiatric examination (R. 439-441); after hearing, said petition was denied (R. 444).

Trial by jury commenced on September 29, 1982; on September 30, 1982, after hearing the evidence, the jury found the Petitioner guilty as charged in the indictment (R. 462). The Petitioner waived the participation of the jury in the sentencing phase of the trial (R. 401). On October 1, 1982, a sentencing hearing was held (R. 404-416). After a presentence report was considered by the trial court (R. 417-420), the Petitioner was sentenced to death on October 29, 1982 (R. 425). The case was automatically appealed to the Alabama Court of Criminal Appeals.

On March 1, 1983, the conviction and sentence of the Petitioner were affirmed by the Alabama Court of Criminal Appeals. An application for rehearing was filed on March 14, 1983, and denied on March 29, 1983. Petition for certiorari was automatically granted on April 29, 1983.

The Supreme Court of Alabama affirmed the findings of the Alabama Court of Criminal Appeals on September 30, 1983. Rehearing was denied on December 22, 1983.

STATEMENT OF THE FACTS

On July 23, 1982, at approximately 8:30 o'clock A.M., the Petitioner and his companion George Warren loaded some watermelons in rural Russell County, Alabama (R-82). Later that same day, at approximately 1:30 o'clock P.M., the two traveled to the store of James T. Hughes, in Hurtsboro, Russell County, Alabama. They both entered the store and Warren bought and paid for some beer. While they were there alone with Mr. Hughes, he was fatally shot four (4) times with a .38 caliber revolver (R-100).

No money or merchandise was stolen from the victim or his store by either the Petitioner or his companion (R-272). The two left the premises in Warren's pick-up truck, and after switching vehicles with Warren's girl friend, they were arrested by Deputies of the Russell County Sheriff's Department (R-130) in connection with the shooting (R-129).

According to the testimony of the State Witnesses, there was nothing missing from the store, (R-44) and the merchandise did not appear to have been disturbed (R-52). No property found with the Petitioner could be shown to have been removed from the Hughes store (R-148 and R-233). Petitioner made several statements to the law enforcement officers prior to trial, including a statement that he did not intend to rob the victim (R-257) and that he did not take anything (R-256). In a taped statement, investigators did not ask the petitioner about motive, and the statement contained no facts pertaining to theft (R-188-194).

REASONS FOR GRANTING THE WRIT

THE STATE FAILED TO PROVE AN ATTEMPT TO ROB BY EITHER CIRCUMSTANTIAL OR DIRECT EVIDENCE, AND SUCH PROOF WAS ESSENTIAL IN THIS CAUSE IN ORDER TO IMPOSE THE DEATH PENALTY.

The imposition of the death penalty in this case is based on one aggravating circumstance - that "the capital offense was committed while the defendant was engaged in an attempt to commit robbery". The essential elements of Robbery are: 1) Felonious intent; 2) Force or putting in fear as the means of effecting the intent; and, 3) By that means the taking and carrying away of the personal property of another from his person or in his presence, with all three elements occurring in point of time. Davis v. State, 401 So.2d 187 (Ala. Crim. App.), Cert. denied, 401 So.2d 190 (Ala. 1981). The commentary to the robbery statute points out that violence used or threatened must be for the purpose of accomplishing a theft. Code Commentary, §13A-8-40 through §13A-8-44, Code of Alabama, 1975. Though attempt is alleged in this case, there is no evidence to show such an attempt. The statements of the defendant were conflicting and the State showed nothing other than these conflicting statements as proof of an attempt to rob. Additionally, it was shown that the defendant was frightened of the law enforcement officers and that the circumstances surrounding his first statement were unusually intimidating.

Petitioner submits that the finding by the jury of an underlying robbery, or attempt to rob, was based merely on speculation, conjecture and surmise, which did not reach the level of

circumstantial evidence. Lacey v. State, 354 So.2d 342 (Ala. Crim. App. 1978) There was no direct evidence of robbery or attempt to rob. Thus the aggravating circumstance was not proven and the death penalty was inappropriately applied.

Petitioner submits that by failure of proof beyond a reasonable doubt, he has been deprived of his liberty and will be deprived of his life without due process of law and in derogation of the 5th and 14th Amendments to the United States Constitution. Additionally, one should note that in the statutory scheme of the Alabama Criminal Code, an attempted robbery constitutes a Class B felony punishable by a sentence of not less than 2 nor more than 20 years. §13A-4-2(d)(2), Code of Alabama, 1975. Murder committed during any degree of robbery is a Class A felony carrying a penalty of life or not more than 99 years of less than 10 years. §13A-6-2(a)(3), Code of Alabama, 1975. Since the aggravating circumstance was found to be an attempt to rob for which the defendant could have received a maximum of 20 years, the death penalty as applied is cruel and unusual punishment prohibited by the 8th and 14th Amendments to the United States Constitution.

Additionally petitioner submits that the "double standard" involved in the Alabama statutory scheme denied him equal protection of the law in that all persons in his classification (a person accused of murder during robbery) would not be treated equally. Since the murder statute encompasses all degrees of murder and the capital murder statute only encompasses those accused of murder during first degree robbery or the attempt thereof, some defendants accused of murder during first degree robbery, or attempt thereof,

could be prosecuted under the capital statute and some under the non-capital statute. There is no protection included within the Alabama Criminal Code to control arbitrary application of the capital and non-capital "robbery - murders". Thus, the petitioner was denied equal protection of the law under the 14th Amendment.

IN VIEW OF THE LACK OF PROOF AS TO THE AGGRAVATING FACTOR, THE FINDINGS BY THE COURT OF THE STATUTORY MITIGATING FACTOR MANDATES REVERSAL OF THE DEATH PENALTY IMPOSED.

The trial court found that the defendant had no significant history of prior criminal activity, a statutory mitigating circumstance, §13A-5-51(1), Code of Alabama, 1975. As set out herein petitioner contends that the finding of the aggravating circumstances was not supported by the evidence. Because of this lack of proof, petitioner submits that the mitigating circumstance outweighs the aggravating one, and thus, the sentence of death is improper.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Margaret Young Brown
Counsel for Petitioner
214 North College Street
Auburn, Alabama 36830
205-821-6944

FLOYD L. LIKINS, JR.
801 South Railroad Avenue
Post Office Box 2142
Opelika, Alabama 36803
205-749-5606

Appendix A

83-6459

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1983

Ex parte: Johnny Luke

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Johnny Luke

82-622 v.

State of Alabama)

Appeal from Russell Circuit Court

ADAMS, JUSTICE.

Johnny Luke, petitioner, was convicted of the capital offense of "murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant." Code 1975, § 13A-5-40(a)(2). In a separate sentencing phase of the trial, the trial judge sentenced petitioner to death by electrocution. We granted the petition for a writ of certiorari, which petitioner is entitled to as a matter of right, in order to review the decision of the Court of Criminal Appeals affirming petitioner's conviction and sentence of death.

Pursuant to Code 1975, § 13A-5-47(d), the trial court made written findings of facts summarizing the crime and petitioner's participation in it. The Court of Criminal Appeals, in addition to outlining the proceedings in the trial court, incorporated those written findings in its opinion, ___ So. 2d ___. They need not be restated here.

Petitioner raises several issues in his brief. We first consider petitioner's argument that the State did not satisfy its burden of proof as to the robbery component of the capital offense of which he was convicted.

Petitioner asserts that the State's inability to produce direct evidence of a plan to commit robbery, or of an attempt to take or carry away the personal property of the deceased, at the time of the shooting, constitutes a failure of proof by the State. Having carefully considered the opinion of the Court of Criminal Appeals, which we think correctly addressed this issue, we conclude that petitioner's argument is unfounded.

As the appellate court likewise indicated:

> ... it must be considered as settled that inconclusive facts and circumstances tending prima facie to show the corpus delicti may be aided by the admissions or confession of the accused so as to satisfy the jury beyond a reasonable doubt, and so to support a conviction although such facts and circumstances, standing alone, would not thus satisfy the jury of the existence of the corpus delicti.

Hill v. State, 207 Ala. 444, 446, 93 So. 460, 462 (1922); Bridges v. State, 284 Ala. 412, 418, 225 So. 2d 821, 826 (1969). Here, petitioner's statements regarding his intent to rob, albeit conflicting, should be considered with those facts and circumstances that are undisputed, though inconclusive.

The facts are undisputed that petitioner and his companion, one of whom was carrying a pistol, entered a small general merchandise store. While they were in the store, alone with the proprietor, the petitioner's companion brought some beer

to the check-out counter to be rung up and sacked. Thereafter, the proprietor was fatally shot near the cash register, and petitioner and his companion left the store. Though these facts cannot be regarded as conclusive, they have "a just tendency to lead the mind to the conclusion that the offense has been committed," and would be admissible to corroborate the statements of petitioner. Matthews v. State, 55 Ala. 187, 194 (1876), cited in Hill v. State, 207 Ala. at 446, 93 So. at 462. They are unquestionably typical of the now too frequent convenience store robbery. Therefore, we agree with the conclusion of the Court of Criminal Appeals that the verdict of the jury and the written findings of fact of the trial judge were supported by the evidence.

Petitioner also argues that the sentence of death was imposed under the undue influences of passion and prejudice, that the sole aggravating circumstance found by the trial court was not supported by the evidence, and that the death penalty is unconstitutional. We think these issues were properly addressed by the Court of Criminal Appeals, and, therefore, need no further comment by us.

As required by Rule 39(k), A.R.A.P., we have searched the record of both the trial phase and the sentencing phase of petitioner's trial for any plain error or defect which "has or probably has adversely affected the substantive rights of the petitioner." We have found no such error. Moreover, having independently weighed the aggravating and mitigating circumstances in this case, we conclude that the trial court's sentence of death was correct under the circumstances of this

case, and not excessive or disproportionate to the penalty imposed in other robbery-intentional killing cases.

For the foregoing reasons, we affirm the decision of the Court of Criminal Appeals.

AFFIRMED.

Torbert, C. J., Maddox, Faulkner, Jones, Almon, Shores, and Beatty, JJ., concur.

1 MAR 1983

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

4 Div. 98

Johnny Luke

v.

State of Alabama

Appeal from Russell Circuit Court

TYSON, JUDGE

Johnny Luke was indicted for and convicted of the capital murder of James T. Hughes, the proprietor of a general store in Hurtsboro, Alabama, during a robbery in the first degree, or an attempt thereof, in violation of

§ 13A-5-40(a)(2), Code of Alabama 1975.

Pursuant to § 13A-5-44, the appellant, with the consent of the State and with the approval of the trial court, waived the participation of a jury in the sentencing phase of the trial. We have examined the record setting out appellant's waiver of jury participation and we find that appellant was expressly informed of his right to have the jury involved in the sentence proceeding and that the appellant freely and intelligently gave up that right.

Thereafter, the trial court ordered a pre-sentence investigation report as specified in § 13A-5-47(b) and, with the consent of both parties, delayed the sentence hearing pending receipt of the report. Alabama Code § 13A-5-45(a) (1975). Subsequently, the trial court weighed the aggravating and mitigating circumstances according to § 13A-5-47, and sentenced appellant to death. The court entered specific written findings regarding the existence or non-existence of each aggravating circumstance listed in § 13A-5-49, and each mitigating circumstance enumerated in § 13A-5-51 or referred to in § 13A-5-32.[1/]

According to the mandate of § 13A-5-47(d), the trial court made the following findings of fact summarizing the crime and the appellant's participation in this offense, which we hereby adopt: (R. 477-480).

> "At approximately 7:00 A.M., Central Daylight Time, on Friday, July 23, 1982, defendant was awakened by George Warren. Warren wanted defendant to help him load watermelons onto his El Camino pickup truck. They went to the house of Alice Starke, Warren's girlfriend, and loaded watermelons until 8:30 A.M. They then went to the house of Lucile Goode and they left several watermelons. Thereafter they went to the trailer of Warren in rural Russell County. At approximately 12:30 P.M. on that same day, Warren and defendant decided to rob the store of James T. Hughes in Hurtsboro,

---

1/ The trial court's findings of fact and sentence are incorporated herein as Appendix A. (R. 477-483).

Russell County, Alabama. They traveled to the store in Warren's pickup and arrived there at approximately 1:30 P.M. Warren went inside first and purchased two cans of beer. By that time defendant had entered the store armed with a five-shot .38 caliber revolver. This weapon belonged to Warren and had been in defendant's possession for approximately a week. James T. Hughes was behind the counter upon which a cash register was placed. After Hughes made change for Warren's purchase, defendant fired the pistol four times. All four bullets struck Mr. Hughes. He was struck in the face, the upper left arm, the right forearm, and the upper right chest. This last bullet traveled through his body, severing the vena cava to the heart and caused substantial damage to the liver. After being discovered, he was transferred to Cobb Memorial Hospital in Phenix City, Alabama, where he died in surgery. Two bullets were recovered from the body of Mr. Hughes. These bullets were fired from the pistol which was later found in the trailer of George Warren. The death of Mr. Hughes was caused by a gunshot wound to his chest. Mr. Hughes was first discovered by Jimmy Lee Berry, who summoned aid. Mr. John T. Smith was one of the persons giving assistance to Mr. Hughes. Mr. Hughes said several times, 'John T., I'm not going to make it.' Hurtsboro Police Chief Richard Roynon asked Mr. Hughes who shot him. Mr. Hughes responded by saying, 'That Luke boy and George Warren was with him.'

"After the shooting Warren and defendant left the premises. Warren drove the pickup truck to his residence. While enroute defendant removed four spent shells and threw them out the window. Warren went inside his trailer with the pistol and left it there. This pistol was later recovered pursuant to a valid search warrant.

"From Warren's trailer they drove to the house of Alice Starke and borrowed her car. The pickup truck was left in the yard. The defendant and George Warren went to the grocery store of Frank Hendricks in Hurtsboro, Alabama, where Warren bought several items. On the way back to Warren's residence they were apprehended by deputies of the Russell County Sheriff's Department. At that time defendant made a voluntary statement, after waiving his rights under the constitutions of the United States and Alabama. Defendant told Deputy Sheriff B.J. Ammons that Warren and he had decided that morning to go to the store of Mr. Hughes and rob him. He said they went to the store and Hughes 'gave them trouble.' Defendant said he shot Hughes four times. Later that evening, at 5:00 P.M., at the Hurtsboro police department, the defendant said in a voluntary statement, after waiving his constitutional rights, that he and Warren went to Hughes' store. Defendant shot Hughes four times. Defendant also stated that he did not intend to rob Mr. Hughes. At 11:04 P.M. that same night, defendant made another voluntary

statement, after waiving his constitutional rights. Defendant said he and Warren decided about 12:30 P.M. to rob Mr. Hughes' store because Hughes 'had money there.' Defendant said that after Warren purchased some beer he (defendant) started shooting. Defendant said he was going to get money after he shot Hughes but that he didn't because he 'changed his mind.'

"On July 25, 1982, in another voluntary statement after waiving his constitutional rights, defendant said he shot Mr. Hughes. This statement was tape-recorded. Investigator Thomas Boswell testified at trial that after the voluntary waiver of constitutional rights and before the statement was recorded, defendant was asked if robbery was the motive. Investigator Boswell testified that defendant responded in the affirmative.

"James T. Hughes was not armed with any weapon. There is no evidence to indicate that the killing of James T. Hughes by defendant was a justifiable or excusable homicide. The Court finds that defendant went to the store of James T. Hughes to rob him. There defendant intentionally shot and murdered James T. Hughes during an attempt to rob the said James T. Hughes."

I

The appellant insists that, because there was no direct evidence of a theft of property from the victim, the State failed to prove that the murder was committed during a robbery or an attempted robbery.

The appellant's argument focuses on the third element of common-law robbery, "taking and carrying away of the personal property of another," see Davis v. State, 401 So.2d 187, 189 (Ala.Crim.App.), cert. denied, 401 So.2d 190 (Ala. 1981), concluding that without evidence of "taking," the appellant cannot be guilty of the crime charged.

This argument overlooks the fact that the present Alabama robbery statutes are broader than common-law robbery and embrace acts which, under former law, would have amounted to attempted robbery or to assault with intent to rob. Alabama Code §§ 13A-8-40 through -44 (1975) (Commentary); Marvin v. State, 407 So.2d 576 (Ala.Crim.App. 1981). Furthermore, the capital offense is "murder by the defendant during a robbery

in the first degree or an attempt thereof committed by the defendant." Alabama Code § 13A-5-40(a)(2)(1975). Emphasis added.

Therefore, in our judgment, the jury was warranted in finding that appellant shot Hughes "in the course of committing a theft" as the indictment herein charged and as the robbery statutes of this state prohibit.

> " 'IN THE COURSE OF COMMITING A THEFT' embraces acts which occur in an attempt to commit or the commission of theft, or in immediate flight after the attempt or commission."

Alabama Code §§13A-8-40(b)(1975). "Attempt" is defined in § 13A-4-2(a), Code of Alabama 1975, as follows.

> "A person is guilty of an attempt to commit a crime if, with the intent to commit a specific offense, he does any overt act towards the commission of such offense."

The appellant's intent to rob is indicated by his own statements. As this court observed in Watters v. State, 369 So.2d 1262, 1271-72 (Ala.Crim.App. 1978), reversed on other grounds, 369 So.2d 1272 (Ala. 1979):

> "[I]nconclusive facts and circumstances tending prima facie to show the corpus delicti may be aided by the admissions or confession of the accused so as to satisfy the jury beyond a reasonable doubt, and so to support a conviction, although such facts and circumstances, standing alone, would not thus satisfy the jury of the existence of the corpus delicti."

Although appellant also made other statements denying his intent to rob, we must view the evidence in the light most favorable to the State, Cumbo v. State, 368 So.2d 871, 874 (Ala.Crim.App. 1978), cert. denied, 368 So.2d 877 (Ala. 1979), to determine "whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt," Dolvin v. State, 391 So.2d 133, 137 (Ala. 1980).

Thus, not only was the jury warranted in finding appellant's intent to rob from his own statements, but

from the facts, they were also authorized to conclude that appellant's entering the store, drawing the pistol, and shooting Hughes were overt acts toward the commisson of a robbery. The verdict of the jury and the written findings of fact by the trial judge that the capital offense occurred during an attempted robbery were amply supported by the evidence in this cause.

II

The appellant asserts that the jury was unduly affected by the weeping of the victim's widow during the trial, thereby causing the sentence of death to be "imposed under the influence of passion and prejudice," in violation of § 13A-5-53(b)(1).

The record does not indicate that the jurors were distracted, disturbed or influenced in any manner by the presence of Mrs. Hughes. Further, the record reveals that prior to appellant's objection concerning the widow's disply of emotion, the trial court cautioned the jury "not to permit any sympathy, any prejudice, or any emotion for or against anyone to influence you." (R. 31).

More importantly, any influence on the jury could not have tainted the determination of appellant's sentence, since the jury was not involved in the sentencing phase of this trial. Following the appellant's waiver of jury participation, the trial judge alone determined all matters relating to this appellant's sentence.

III

It is hereby noted that the death penalty is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States. Gregg v. Georgia, 428 U.S. 153, 168-88, 226 (1976); Beck v. State, 396 So.2d 645, 655 (Ala. 1980).

IV

Under § 13A-5-53, Code of Alabama, this court is required, in addition to examining the record for errors

affecting appellant's conviction, to review the propriety of the death sentence.

In accord with our statutory mandate, we have reviewed the sentencing phase of the trial and have found no error adversly affecting the appellant's rights. The trial court's findings concerning the aggravating and mitigating circumstances are fully supported by the evidence and, in our judgment, the sentence of death is proper in this case.

As shown by Appendix A, the trial court found one aggravating circumstance to exist and one mitigating circumstance to be present. The existence of the aggravating circumstance outline in § 13A-5-49(4) (The capital offense was committed while the defendant was engaged in an attempt to commit robbery) is fully borne out by the evidence presented. The presence of the mitigating circumstance set out in § 13A-5-51(1) (The defendant has no significant history of prior criminal activity) is also supported by the evidence. Further, the record reveals the trial court's assessment to be correct, that no aggravating or mitigating circumstances, other than those specifically found to be present, existed.

We have also determined, in accord with § 13A-5-53(b) and (c) that

(1) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) that our independent weighing of the aggravating and mitigating circumstances at the appellate level reveals the death penalty is the proper sentence under the evidence; and

(3) that the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and this defendant-appellant. See Beck v. State, 396 So.2d 645, 654 n. 5 (1980) (the great majority of death sentences in Alabama are for robbery-murder).

In addition to addressing all of the questions raised by this appellant on this appeal, we have carefully searched

the entire record for plain error, A.R.A.P. 45 A, and have found none adversely affecting appellant's substantial rights. The judgment of conviction and sentence of death is due to be and is hereby affirmed.

AFFIRMED.

All the Judges concur.

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
	)	
Plaintiff	)	RUSSELL COUNTY, ALABAMA
	)	
vs.	)	CRIMINAL ACTION NO. CC 82-320
	)	
JOHNNY LUKE,	)	
	)	
Defendant	)	

DETERMINATION OF SENTENCE BY THE COURT

The defendant herein, with assistance of counsel at all proceedings, was found guilty as charged in the indictment. The Court heard the evidence at trial. Pursuant to Section 13A-5-47, the Court makes the following findings of fact summarizing the crime herein and the defendant's participation in it:

FINDINGS OF FACT FROM THE GUILT PHASE

At approximately 7:00 A. M., Central Daylight Time, on Friday, July 23, 1982, defendant was awakened by George Warren. Warren wanted defendant to help him load watermelons onto his El Camino pickup truck. They went to the house of Alice Starke, Warren's girlfriend, and loaded watermelons until 8:30 A. M. They then went to the house of Lucille Goode and they left several watermelons. Thereafter they went to the trailer of Warren in rural Russell County. At approximately 12:30 P. M. on that same day, Warren and defendant decided to rob the store of James T. Hughes in Hurtsboro, Russell County, Alabama. They traveled to the store in Warren's pickup and arrived there at approximately 1:30 P. M. Warren went inside first and purchased two cans of

beer. By that time defendant had entered the store armed with a five-shot .38 caliber revolver. This weapon belonged to Warren and had been in defendant's possession for approximately a week. James T. Hughes was behind the counter upon which a cash register was placed. After Hughes made change for Warren's purchase, defendant fired the pistol four times. All four bullets struck Mr. Hughes. He was struck in the face, the upper left arm, the right forearm, and the upper right chest. This last bullet traveled through his body, severing the vena cave to the heart and caused substantial damage to the liver. After being discovered, he was transported to Cobb Memorial Hospital in Phenix City, Alabama, where he died in surgery. Two bullets were recovered from the body of Mr. Hughes. These bullets were fired from the pistol which was later found in the trailer of George Warren. The death of Mr. Hughes was caused by a gunshot wound to his chest. Mr. Hughes was first discovered by Jimmy Lee Berry, who summoned aid. Mr. John T. Smith was one of the persons giving assistance to Mr. Hughes. Mr. Hughes said several times, "John T., I'm not going to make it." Hurtsboro Police Chief Richard Roynon asked Mr. Hughes who shot him. Mr. Hughes responded by saying, "That Luke boy and George Warren was with him."

After the shooting Warren and defendant left the premises. Warren drove the pickup truck to his residence. While enroute defendant removed four spent shells and threw them out the window.

Warren went inside his trailer with the pistol and left it there. This pistol was later recovered pursuant to a valid search warrant.

From Warren's trailer they drove to the house of Alice Starke and borrowed her car. The pickup truck was left in the yard. The defendant and George Warren went to the grocery store of Frank Hendricks in Hurtsboro, Alabama, where Warren bought several items. On the way back to Warren's residence they were apprehended by deputies of the Russell County Sheriff's Department. At that time defendant made a voluntary statement, after waiving his rights under the constitutions of the United States and Alabama. Defendant told Deputy Sheriff B. J. Ammons that Warren and he had decided that morning to go to the store of Mr. Hughes and rob him. He said they went to the store and Hughes "gave them trouble." Defendant said he shot Hughes four times. Later that evening, at 5:00 P. M., at the Hurtsboro police department, the defendant said in a voluntary statement, after waiving his constitutional rights, that he and Warren went to Hughes' store. Defendant shot Hughes four times. Defendant also stated that he did not intend to rob Mr. Hughes. At 11:04 P. M. that same night, defendant made another voluntary statement, after waiving his constitutional rights. Defendant said he and Warren decided about 12:30 P. M. to rob Mr. Hughes' store because Hughes "had money there." Defendant said that after Warren purchased some beer he (defendant) started shooting. Defendant said he was going to get money after he shot Hughes but that he didn't because he "changed his mind."

On July 25, 1982, in another voluntary statement after waiving his constitutional rights, defendant said he shot Mr. Hughes. This statement was tape-recorded. Investigator Thomas Boswell testified at trial that after the voluntary waiver of constitutional rights and before the statement was recorded, defendant was asked if robbery was the motive. Investigator Boswell testified that defendant responded in the affirmative.

James T. Hughes was not armed with any weapon. There is no evidence to indicate that the killing of James T. Hughes by defendant was a justifiable or excusable homicide. The Court finds that defendant went to the store of James T. Hughes to rob him. There defendant intentionally shot and murdered James T. Hughes during an attempt to rob the said James T. Hughes.

After the trial both the State of Alabama and the defendant waived the participation of a jury in the sentence hearing. The Court finds that the defendant was expressly informed of his right to have the jury participate in the sentence hearing. The Court further finds that the defendant fully, voluntarily, knowingly, and intelligently waived his right to the participation of a jury in this sentence hearing.

Subsequently the Court held a sentence hearing without the participation of a jury. At the sentence hearing the State rested on the evidence adduced at trial. At this hearing the defendant took the stand and testified that he did not intend to

rob Mr. Hughes or take anything out of the store. He further testified that he was sorry about what happened at the store. He further expressed his desire to live. The Court then received arguments from the counsel for both parties.

The Court also ordered the probation officer for this circuit to prepare a written presentence investigation report. This report was duly prepared and filed with the Court. Copies of the same were furnished to counsel for both parties. A hearing was held for the parties to respond to the report and to present evidence about any part of the report which would be the subject of a factual dispute. At this hearing the State presented no further evidence. The defendant, through his counsel, rested upon the matters brought forth at the sentence hearing.

The Court finds from the evidence presented in this case that the defendant was guilty and is guilty of the murder of James T. Hughes while committing a robbery in the first degree.

FINDINGS FROM THE SENTENCE PHASE

The Court finds the following aggravating circumstance to exist in this case:

The capital offense was committed while the defendant was engaged in the commission of an attempt to commit robbery.

The Court finds that the following aggravating circumstances do not exist in this case:

a. the capital offense was committed by a person under

sentence of imprisonment.

b. the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person.

c. the defendant knowingly created a great risk of death to many persons.

d. the capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

e. the capital offense was committed for pecuniary gain.

f. the capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

g. the capital offense was especially heinous, atrocious or cruel compared to other capital offenses.

Upon consideration of all the evidence brought forth at the trial in this case, the sentence hearing, and the presentence investigation report, the Court finds that the following mitigating circumstance exists in this case:

The defendant has no significant history of prior criminal activity.

The Court finds that the following mitigating circumstances do not exist in this case:

a. the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

b. the victim was a participant in the defendant's conduct or consented to it.

c. the defendant was an accomplice in the felony offense committed by another person and his participation was relatively minor.

d. the defendant acted under extreme duress or under the substantial domination of another person.

e. the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

f. the age of the defendant at the time of the crime.

g. any other circumstances offered pursuant to Section 13A-5-52.

Upon considering and weighing the aggravating circumstance with the mitigating circumstances in this case, the Court is of the opinion that the aggravating circumstance outweighs any mitigating circumstances. It is, therefore,

ORDERED AND ADJUDGED BY THE COURT that the defendant be sentenced to death by electrocution as specified in the laws of this state and as set forth in an order of sentence by this Court.

DONE this the 29th day of October, 1982.

FILED IN OFFICE
'82 NOV 3 PM
CIRCUIT/DIST. COURT
RUSSELL CO. ALA.

Wayne D. Johnson
Circuit Judge

83-6459

AFFIDAVIT IN SUPPORT OF REQUEST
TO PROCEED IN FORMA PAUPERIS

Johnny LUKE
Plaintiff(s)

vs.

STATE OF ALABAMA
Defendant(s)

I, Johnny LUKE, being first duly sworn, depose and say that I am the plaintiff in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? YES ( ) NO (✓)

   A. If the answer is YES, state the amount of your salary or wages per month, and give the name and address of your employer.
   ALABAMA STATE DEPARTMENT Located in Seale ALABAMA RUSSELL COUNTY

   B. If the answer is NO, state the date of last employment and the amount of salary and wages per month which you received.
   JULY 22 1982 monthly [redacted] 50 & 81
   Five hundred & Eight Dollars 81 ¢

2. Have you received within the past twelve months any money from any of the following sources?

   A. Business, profession or form of self-employment? YES ( ) NO (✓)

   B. Rent payments, interest or dividends? YES ( ) NO (✓)

   C. Pensions, annuities or life insurance payments? YES ( ) NO (✓)

   D. Gifts or inheritances? YES (✓) NO ( )

   E. Any other sources? YES ( ) NO (✓)

If the answer to any of the above is YES, describe each source of money and state the amount received from each during the past twelve months.
I Received gifts From my people and Friends. Money. I don't Know the exact in the past year

3. Do you own cash, or do you have money in a checking or savings account? [Include any funds in prison accounts.] YES ( ) NO ( )

If the answer is YES, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property [excluding ordinary household furnishings and clothing]? YES ( ) NO (—)

If the answer is YES, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons and indicate how much you contribute toward their support. none

Johnny LUKE
Signature of Affiant

STATE OF ALABAMA)
COUNTY OF ECAM.)

Before me, a notary public in and for said County, in said State, personally appeared Johnny LUKE, whose name is signed to the foregoing complaint, who being first duly sworn, deposes on oath and says:

That the information set forth in the foregoing affidavit is true and correct to the best of his knowledge and belief.

Johnny LUKE
Signature of Affiant

Sworn to and subscribed before me this 6th day of March, 1981.

Eddie Davidson
Notary Public

3-25-85
County, Alabama

O R

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____.
(date)

Johnny LUKE
Signature of Affiant

CERTIFICATE

I hereby cerfify that the plaintiff herein has the sum of $5.25 on 3/6/84 account to his credit at the HOLMAN UNIT institution where he is confined. I further certify that plaintiff likewise has the following securities to his credit according to the records of said institution:

NONE

[signature] 3/7/84
Authorized Officer of Institution

Date March 7, 1984

NO. 83-6459

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHNNY LUKE,

Petitioner

V.

STATE OF ALABAMA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL

WILLIAM D. LITTLE
ALABAMA ASSISTANT ATTORNEY
GENERAL

Counsel of Record

250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant certiorari where the question of the sufficiency of the evidence to convict is essentially a question of state law? (No)

2. Should this Court grant certiorari where the question of the sufficiency of the evidence to prove an aggravating circumstance is essentially a question of state law? (No)

3. Should this Court grant certiorari where the question of whether the imposition of the death penalty for this type of crime violates the Eighth Amendment has been conclusively decided against the Petitioner by previous decision of this Court? (No)

4. Should this Court grant certiorari where the question regarding the alleged arbitrary application of the Alabama capital punishment statute has been conclusively decided against the Petitioner by previous decision of this Court? (No)

PARTIES

The caption contains the names of all parties in the courts below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming the Petitioner's conviction and death sentence is Luke v. State, 444 So.2d 393 (Ala.Crim.App. 1983).

2. The opinion of the Alabama Supreme Court affirming the decision of the Court of Criminal Appeals is Ex parte Luke, 444 So.2d 400 (Ala. 1983).

JURISDICTION

The decision of the Alabama Supreme Court from which the Petitioner seeks relief was entered on September 30, 1983, and the Petitioner's timely application for rehearing was overruled on December 22, 1983. On March 9, 1984, this Court extended through March 21, 1984, the time within which the Petitioner could file a petition for writ of certiorari. On March 20, 1984, the Petitioner filed in this Court a petition for writ of certiorari.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition raises issues involving the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

The statute under which the Petitioner was indicted and convicted, Code of Alabama 1975, §13A-5-40(a)(2), provides as follows:

> (a) The following are capital offenses:
>
> * * *
>
> (2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

STATEMENT OF THE CASE

The facts of the crime, as found by the trial court in its sentencing order, are as follows:

> At approximately 7:00 A. M., Central Daylight Time, on Friday, July 23, 1982, defendant was awakened by George Warren. Warren wanted defendant to help him load watermelons onto his El Camino pickup truck. They went to the house of Alice Starke, Warren's girlfriend, and loaded watermelons until 8:30 A. M. They then went to the house of Lucille Goode and they left several watermelons. Thereafter they went to the trailer of Warren in rural Russell County. At approximately 12:30 P. M. on that same day, Warren and defendant decided to rob the store of James T. Hughes in Hurtsboro, Russell County, Alabama. They traveled to the store in Warren's pickup and arrived there at approximately 1:30 P. M. Warren went inside first and purchased two cans of beer. By that time defendant had entered the store armed with a five-shot .38 caliber revolver. This weapon belonged to Warren and had been in defendant's possession for approximately a week. James T. Hughes was behind the counter upon which a cash register was placed. After Hughes made change for Warren's purchase, defendant fired the pistol four times. All four bullets struck Mr. Hughes. He was struck in the face, the upper left arm, the right forearm, and the upper right chest. This last bullet traveled through his body, severing the vena cave to the heart and caused substantial damage to the liver. After being discovered, he was transported to Cobb Memorial Hospital in Phenix City, Alabama, where he died in surgery. Two bullets were recovered from the body of Mr. Hughes. These bullets were fired from the pistol which was later found in the trailer of George Warren. The death of Mr. Hughes was caused by a gunshot wound to his chest. Mr. Hughes was first discovered by Jimmy Lee Berry, who summoned aid. Mr. John T. Smith was one of the persons giving assistance to Mr. Hughes. Mr. Hughes said several times, "John T., I'm not going to make it." Hurtsboro Police Chief Richard Roynon asked Mr. Hughes who shot him. Mr. Hughes responded by saying, "That Luke boy and George Warren was with him."

After the shooting Warren and defendant left the premises. Warren drove the pickup truck to his residence. While enroute defendant removed four spent shells and threw them out the window. Warren went inside his trailer with the pistol and left it there. This pistol was later recovered pursuant to a valid search warrant.

From Warren's trailer they drove to the house of Alice Starke and borrowed her car. The pickup truck was left in the yard. The defendant and George Warren went to the grocery store of Frank Hendricks in Hurtsboro, Alabama, where Warren bought several items. On the way back to Warren's residence they were apprehended by deputies of the Russell County Sheriff's Department. At that time defendant made a voluntary statement, after waiving his rights under the constitutions of the United States and Alabama. Defendant told Deputy Sheriff B. J. Ammons that Warren and he had decided that morning to go to the store of Mr. Hughes and rob him. He said they went to the store and Hughes "gave them trouble." Defendant said he shot Hughes four times. Later that evening, at 5:00 P. M., at the Hurtsboro police department, the defendant said in a voluntary statement, after waiving his constitutional rights, that he and Warren went to Hughes' store. Defendant shot Hughes four times. Defendant also stated that he did not intend to rob Mr. Hughes. At 11:04 P. M. that same night, defendant made another voluntary statement, after waiving his constitutional rights. Defendant said he and Warren decided about 12:30 P. M. to rob Mr. Hughes' store because Hughes "had money there." Defendant said that after Warren purchased some beer he (defendant) started shooting. Defendant said he was going to get money after he shot Hughes but that he didn't because he "changed his mind."

On July 25, 1982, in another voluntary statement after waiving his constitutional rights, defendant said he shot Mr. Hughes. This statement was tape-recorded. Investigator Thomas Boswell testified at trial that after the voluntary waiver of constitutional rights and before the statement was recorded, defendant was asked if robbery was the motive. Investigator Boswell testified that defendant responded in the affirmative.

The Petitioner was indicted on August 25, 1982, by the Grand Jury of Russell County, Alabama, on the charge of Murder during a Robbery in the First Degree (R. 429 & 430). On September 8, 1982, the Petitioner was arraigned and pleaded not guilty (R. 434). On September 13, 1982, the Petitioner filed a petition for psychiatric examination (R. 439-441); after hearing, this petition was denied (R. 444).

Trial by jury commenced on September 29, 1982; on September 30, 1982, after hearing the evidence, the jury found the Petitioner guilty as charged in the indictment (R. 462). The Petitioner waived the participation of the jury in the sentencing phase of the trial (R. 401). On October 1, 1982, a sentencing hearing was held (R. 404-416). After a pre-sentence report was considered by the trial court (R. 417-420), the Petitioner was sentenced to death on October 29, 1982 (R. 425). The case was automatically appealed to the Alabama Court of Criminal Appeals.

On March 1, 1983, the Petitioner's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals. An application for rehearing was filed on March 14, 1983, and denied on March 29, 1983.

Petition for certiorari was granted by the Alabama Supreme Court as a matter of right on April 29, 1983. On September 30, 1983, the Alabama Supreme Court affirmed the decision of the Alabama Court of Criminal Appeals. The Petitioner's application for rehearing was denied on December 22, 1983.

On February 3, 1984, the Petitioner filed in this Court a motion for extension of time within which to file a petition for writ of certiorari, and on March 9, 1984, this Court extended this time through March 21, 1984. On March 20, 1984, the Petitioner filed in this Court a petition for

writ of certiorari. On April 16, 1984, this Court stayed the scheduled execution of the Petitioner pending consideration of his petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Petitioner's issues as to the sufficiency of the evidence of an attempt to rob are essentially questions of state law which this Court need not address. These questions were correctly decided by the courts below.

The Petitioner's argument that the imposition of the death penalty for murder during an attempt to rob violates the Eighth Amendment is foreclosed by this Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976).

The Petitioner's equal protection argument is foreclosed by this Court's decision in Gregg v. Georgia, supra.

ARGUMENT

I. THE ISSUE OF WHETHER THE EVIDENCE OF AN ATTEMPT TO ROB WAS SUFFICIENT TO CONVICT UNDER CODE OF ALABAMA 1975, SECTION 13A-5-40(a)(2), IS ESSENTIALLY A QUESTION OF STATE LAW. THUS THIS COURT SHOULD NOT GRANT CERTIORARI AS TO THIS ISSUE.

The Petitioner argues that the evidence of an attempt to rob was insufficient to warrant conviction of the capital offense of robbery/murder under Code of Alabama 1975, §13A-5-40(a)(2). While the Petitioner invokes the authority of the Fifth and Fourteenth Amendments, the question presented is essentially one of state law. This Court does not concern itself with errors of state law. Barclay v. Florida, ____ U.S. ____, 77 L.Ed.2d 1134, 1149 (1983).

Moreover, the Alabama appellate courts have correctly determined that the Petitioner's admissions of an intent to rob, when considered in conjunction with the circumstances of the crime, provide sufficient evidence that the murder took place during an attempt to rob. Luke v. State, 444 So.2d 393, 396 (Ala.Crim.App. 1983); Ex parte Luke, 444 So.2d 400, 401 (Ala. 1983).

For the above reasons, the Court should deny certiorari as to this ground.[1]

II. THE ISSUE OF WHETHER THE EVIDENCE OF AN ATTEMPT TO ROB WAS SUFFICIENT TO PROVE THE EXISTENCE OF THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER OCCURRED DURING AN ATTEMPT TO ROB IS ESSENTIALLY A QUESTION OF STATE LAW. THUS THIS COURT SHOULD NOT GRANT CERTIORARI AS TO THIS ISSUE.

The Petitioner argues that the evidence that the murder took place during an attempt to rob was insufficient to prove this as an aggravating circumstance, and thus that the death penalty is inappropriate in this case. This question is essentially one of state law. This court does not concern itself with errors of state law. Barclay v. Florida, supra.

---

[1] The Petitioner states in brief that "it was shown that the defendant was frightened of the law enforcement officers and that the circumstances surrounding his first statement were unusually intimidating." Petitioner's brief, p. 6. No contention that the Petitioner's statements were inadmissible was made in the appellate courts below. (Exhibit A, copies of Petitioner's briefs filed in the Alabama Supreme Court and Court of Criminal Appeals.) Neither was this issue addressed by the Alabama appellate courts. Luke v. State, 444 So.2d 393 (Ala.Crim.App. 1983); Ex parte Luke, 444 So.2d 400, (Ala. 1983). Because the Petitioner did not present this issue to the state appellate courts below and it was not decided by them, this Court need not decide it. Moore v. Illinois, 408 U.S. 786, 799 (1972), should not decide it, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974), and has no jurisdiction to decide it, Street v. New York, 394 U.S. 576, 581-582 (1969); See, 28 U.S.C. §1257(2) and (3).

Moreover, the Alabama appellate courts have correctly determined that the Petitioner's admissions of an intent to rob, when considered in conjunction with the circumstances of the crime, provide sufficient evidence that the murder took place during an attempt to rob. Luke v. State, 444 So.2d 393, 396 (Ala.Crim.App. 1983); Ex parte Luke, 444 So.2d 400, 401 (Ala. 1983). Review of this finding as to an aggravating circumstance is limited to the question of whether it is so unprincipled or arbitrary as to somehow violate the United States Constitution. Barclay v. Florida, ____ U.S. ____, 77 L.Ed.2d 1134, 1142 (1983). Because this finding was not unprincipled or arbitrary it should be affirmed.

For the above reasons, certiorari should be denied as to this issue.

III. THE PETITIONER'S SENTENCE OF DEATH FOR MURDER DURING THE COURSE OF AN ATTEMPT TO ROB DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

The Petitioner argues that his sentence of death for the offense of murder during an attempt to rob constitutes cruel and unusual punishment. This Court has previously determined that the imposition of the death penalty for the crime of murder does not constitute cruel and unusual punishment. Gregg v. Georgia, 428 U.S. 153, 186 & 187 (1976). Thus a death sentence for murder plus an aggravating circumstance cannot be unconstitutionally cruel and unusual.

IV. THE PETITIONER'S EQUAL PROTECTION ARGUMENT IS FORECLOSED BY THIS COURT'S DECISION IN GREGG V. GEORGIA.

The Petitioner argues that the fact that he could have been prosecuted under Code of Alabama 1975, §13A-6-2, the Alabama murder statute, or Code of Alabama 1975, §13A-5-40, the Alabama capital murder statute, violates equal protection. A similar argument based upon the Eighth Amendment was rejected by this Court in Gregg v. Georgia, 428 U.S. 153 (1976). In Gregg, the defendant argued that the existence of prosecutorial discretion as to whether an accused would be charged with capital murder or a lesser degree of homicide rendered Georgia's capital punishment scheme unconstitutional as arbitrary and capricious in violation of Furman v. Georgia, 408 U.S. 238 (1972). This Court rejected this argument. Gregg v. Georgia, supra, 199, 224 & 225 (1976). Because the argument in Gregg as to arbitrariness and capriciousness due to prosecutorial discretion is similar to the Petitioner's argument here, the Court should reject this argument based upon Gregg. Thus the Court should not grant certiorari as to this issue.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Charles A. Graddick
CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL

William D. Little
WILLIAM D. LITTLE
ALABAMA ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

OFFICE OF THE ATTORNEY GENERAL
250 ADMINISTRATIVE BUILDING
MONTGOMERY, ALABAMA 36130
(205) 834-5150

CERTIFICATE OF SERVICE

I, William D. Little, a member of the bar of the Supreme Court of the United States, do hereby certify that I did serve copies of this brief on the Petitioner by placing said copies in the United States mail, postage prepaid, and properly addressed to his counsel of record as follows:

Honorable Margaret Young Brown
214 North College Street
Auburn, Alabama 36830

Honorable Floyd Likins
801 South Railroad Avenue
P. O. Box 2142
Opelika, Alabama 36903

I further certify that I have served all parties required to be served.

DONE this 20th day of April, 1984.

William D. Little

WILLIAM D. LITTLE
ALABAMA ASSISTANT ATTORNEY GENERAL

ATTORNEY FOR RESPONDENT

MAR 14 1983

IN THE COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

Little
Response Due
If Nec
2-28-83

JOHNNY LUKE,

Appellant

vs.

THE STATE OF ALABAMA,

Appellee

CASE NO. 4 Div. 98

APPLICATION FOR REHEARING

BRIEF OF APPELLANT

James M. Ivins
CORNETT, PERDUE & IVINS
Post Office Box 88
1408 Broad Street
Phenix City, Alabama

Attorney for Appellant

TABLE OF CONTENTS

IN THE COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

JOHNNY LUKE,	)	CRIMINAL COURT
Appellant	)	CASE NO 4 Div. 98
	)	
vs.	)	
	)	
STATE OF ALABAMA,	)	
Appellee	)	

APPLICATION FOR REHEARING

Comes now the Appellant and makes this his application for rehearing and in support of such application attaches his brief.

CORNETT, PERDUE & IVINS

By: James M. Ivins

James M. Ivins
Attorney for Appellant
1408 Broad Street
Post Office Box 88
Phenix City, AL 36867

TABLE OF AUTHORITIES

ARGUMENT

I.

THE APPELLATE COURT COMMITTED ERROR WHEN IT REFUSED TO REVERSE DEFENDANT'S CONVICTION.

A. The Trial Court made a "finding of fact" which was adopted by Appellate Court. The Trial Court's finding of fact was not correct and should not be used as the basis of affirming Appellant's conviction. Determining the facts is a function for the jury. The Appellate Court has a duty to review the facts by examining the record of the trial proceedings and by not merely adopting the Trial Court's rendition of the evidence.

B. The facts do not support a conviction of a capital offense. There is no direct evidence of a theft of property from the victim. There was also no direct evidence that the victim was shot "in the course of committing a theft" as defined by the statute. The Trial Court's findings concerning the aggravating circumstance is not fully supported by the evidence, therefore, the sentence of death is not proper.

C. The Code of Alabama, 1975 §13A-4-2 directs a lesser punishment for an attempt than for the commission of the uncompleted underlying charge. Assuming that the underlying charge was a Class A felony, then punishment for an attempt thereof could not be greater than a Class B felony, or two (2) to twenty (20) years. In effect, the Appellant has been sentenced to death for a charge that would ordinarily be punishable for a term not to exceed twenty (20) years. Therefore, in this case, the death penalty is a cruel and unusual punishment prohibited by the 8th and 14th Amendments to the Constitution of the United States.

D. The death sentence is not the proper sentence under the evidence. The sentence of death is excessive and disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and this Defendant-Appellant. The sentence of death was imposed under the influence of passion and prejudice. The Trial Court committed several errors which has adversely affected Appellant's substantial rights.

The Defendant's conviction must be reversed.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief upon the Clerk of the Court of Criminal Appeals and to the Attorney General of the State of Alabama, by depositing a copy of the same, postage prepaid, certified mail, return receipt requested and properly addressed to:

Hon. Mollie Jordan
Clerk, Court of Criminal Appeals
Post Office Box 351
Montgomery, AL 36101

Hon. Charles Graddick
Attorney General
64 North Union Street
250 Administrative Building
Montgomery, AL 36130

This the 14th day of March, 1983.

CORNETT, PERDUE & IVINS

By: James M. Ivins

James M. Ivins
Attorney for Appellant
1408 Broad Street
Post Office Box 88
Phenix City, AL 36867
(205) 298-0607

Extra Copy

Little

SBD

1-4-83

IN THE COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

JOHNNY LUKE,

Appellant

vs.

THE STATE OF ALABAMA,

Appellee

CASE NO. 4 Div. 98

BRIEF OF APPELLANT

James M. Ivins
CORNETT, PERDUE & IVINS
Post Office Box 88
1408 Broad Street
Phenix City, Alabama 36867

Attorney for Appellant

EXHIBIT A

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The Defendant was arrested on July 23, 1982, by the Russell County Sheriff's Deputies for a shooting in Hurtsboro (R-129). The Defendant was indicted by the Russell County Grand Jury on August 25, 1982, on the charge of Murder during Robbery First Degree (429-430). After arraignment and appointment of counsel on September 8, 1982, (434), the Defendant on September 13, 1982, filed a Motion to have Case Continued, a Motion to Suppress and a Petition for Psychiatric Examination (436-441). On September 13, 1982, the trial court denied Defendant's motion to have the case continued. Although there was a hearing on the Petition for Psychiatric Examination (444), there is no record of the proceeding included in the record on appeal. The Trial Court denied Defendant's Petition for Psychiatric Examination on September 28, 1982, (444). The hearing on the motion to suppress was continued until the date of trial.

The jury trial of the case was held on October 29, 1982, and October 30, 1982, with the jury returning a verdict of guilty of Murder during Robbery in the First Degree (462). The Defendant waived the participation of the jury in the sentence hearing (R-401) which was held on October 1, 1982, (R-404-416).

A presentence hearing was held on October 26, 1982, (R-417-420). Sentencing was held on October 29, 1982, (R-421) wherein the Defendant was sentenced to death by the Trial Court (R-425). There was automatic appeal to the Court of Criminal Appeals (484).

STATEMENT OF THE ISSUES PRESENTED

ARGUMENT I. THE STATE FAILED TO MEET ITS BURDEN OF PROOF AS TO A ROBBERY.

Code of Alabama, 1975, Section 13A-8-41.

Davis vs. State 401 So.2d 187 (Ala. Crim. App), cert. denied, 401 So.2d 190, (Ala. 1981).

Ala. Crim. Code, Offenses Involving Theft, Section 13A -8-80 through 13A -8-44, commentary

Code of Alabama, Section 13A-4-2 (1975)

People vs. Miller 42 P 2d 3081 (Cal. 1935).

Huggins vs. State 41 Ala. App. 548, 142 So.2d 915 cert. denied 272 Ala. 708, 145 So.2d 918, (1962).

Model Penal Code Commentary, (tentative draft No. 10) Pages 69-73.

Code of Alabama, 1975, Section 13A-4-2, commentary.

Deal vs. State 13 So.2d 688 (1943).

Clark vs. U.S. 293 F.2d 445, C. A. Ala. (1961).

Seale vs. State 108 So.2d 271, 21 Ala. App. 351 (1926).

Piano vs. State 49 So. 803, 161 Ala. 38 (1909).

Gilbert vs. State 3 So.2d 95, 30 Ala. App. 214 (1941).

ARGUMENT III. THE DEATH PENALTY IS UNCONSTITUTIONAL.

Beck vs. Alabama, 447 U.S. 626, 65 L. Ed. 2d 100 S. Ct. 2382, 1980 (Marshall, J., concurring

Furman vs. Georgia, 308 U.S. 238, 314-374, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1974), (Marshall J. Concurring)

Gregg vs. Georgia, 428 U.S. 153, 231-241, 449 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (Marshall, J. Dissenting)

Godfrey vs. Georgia, 446 U.S. 420, 433-442, 64 L. Ed. 2d 398 100 S. Ct. 1759. (1980) (Marshall, J. concurring in Judgment)

Beck vs Alabama, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980), (Brennan, J. concurring)

Gregg vs. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (Brennan, J. dissenting)

Furman vs. Georgia, 408 U.S. 238, 237, 33 L. Ed. 2d 346, 92 S. Ct. 2727, (1972) (Brennan, J. concurring)

Constitution of the United States, Amendments 8 and 14.

STATEMENT OF THE FACTS

On July 23, 1982, at approximately 8:30 a.m., the Defendant and his companion George Warren loaded some watermelons in rural Russell County, Alabama (R-82). Later that same day, at approximately 1:30 p.m., the two travelled to the store of James T. Hughes, in Hurtsboro, Russell County, Alabama. They both entered the store and Warren bought and paid for some beer. While they were there alone with Mr. Hughes, he was fatally shot four times with a .38 caliber revolver (R-100).

No money or merchandise was stolen from the victim or his store by either the Defendant or his companion (R-272). The two left the premises in Warren's pick-up truck, and after switching vehicles with Warren's girlfriend, they were arrested by Deputies of the Russell County Sheriff's Department (R-130) in connection with the shooting (R-129).

ARGUMENT

I.

THE STATE FAILED TO MEET ITS BURDEN OF PROOF AS TO A ROBBERY.

The Defendant was charged in the indictment with causing the death of James T. Hughes while in the course of committing a theft of property from Mr. Hughes (429). The underlying charge is Robbery in the First Degree. Section 13A-8-41 Code of Alabama, 1975. In order for the Defendant to have been properly convicted as charged in the indictment, the burden of proof was on the state to show that a robbery had been committed. As disclosed by the record, this they were unable to do beyond a reasonable doubt. The three essential elements of the crime of robbery are: (1) Felonious intent; (2) Force or putting in fear as the means of effecting the intent; and (3) By that means the taking and carrying away of the personal property of another from his person or in his presence, with all three elements occurring in point of time. Davis vs. State 401 So.2d 187 (Ala.Crim. App.), cert. denied, 401 So.2d 190, (Ala. 1981).

Richard L. Roynon, Chief of Police of Hurtsboro, had no knowledge of anything being taken from the store (R-44).

George Chambliss, a customer at the store who had left just prior to the shooting (R-65) and who returned just after the shooting (R-71) did not remember if the cash register was open or closed (R-72).

John T. Smith, one of the first witnesses on the scene after the shooting (R-47), stated that no merchandise was disturbed, that he could not say that anything had been taken (R-52).

Thomas F. Boswell, Russell County Sheriff's Department did not know if any money was removed from Mr. Hughes' store (R-264) and could not testify that anything from the store was taken by the Defendant or his companion (R-272). Captain Boswell further stated that the Defendant denied taking any money from the cash register (R-278).

Joseph Michael Brundrick, one of the arresting officers (R-146), could not identify any property found on the Defendant as being taken from Mr. Hughes' store (R-148).

Herbert L. Parker, Russell County Sheriff's Department, could not identify any property that was seized from the Defendant as being from the store (R-233).

The Defendant, on the tape that was entered into evidence as State's Exhibit No. 25-A, stated that his companion, George Warren, actually paid for a purchase at the store (R-189), and that they did not take any other property from Mr. Hughes' store

(R-191). In addition, the Defendant in a statement marked as State's Exhibit 24, when asked if he got any money out of the register or off of Mr. Hughes' body, replied "no, I didn't" (R-295).

Raymond B. Smith, Russell County Sheriff's Department, testified that after the shooting Mr. Hughes had $150.00 in cash in his wallet and $23.69 in his front pocket (R-282). Officer Smith further testified that there was an additional $655.98 in the cash register after the shooting (R-284).

The Defendant in his statement marked as State's Exhibit No. 23, stated that he did not intend to rob Mr. Hughes, he just pulled the pistol and shot him (R-256). The violence used or threatened must be for the purpose of accomplishing a theft. Violence used or threatened for some purpose unrelated to theft is a separate offense against the person. Ala. Crim. Code, Offenses Involving Theft, Section 13A -8-80 through 13A -8-44, commentary. There was no intent to commit robbery as per the 1975 Code of Alabama, Section 13A-4-2, so the only intent that could be reasonably argued would be the shooting.

There is no evidence of any plan or scheme to commit any robbery before the shooting, nor any evidence of any theft after the shooting. The victim was alone in his store, and after he became incapacitated, there were no intervening circumstances to prevent the Defendant from committing a theft if that had been his intention. In order to be guilty of the underlying charge by way of an attempt, the attempt must be in such progress that it

will be consumated unless interrupted by circumstances independent of the will of the attempter. People vs. Miller 42 P.2d 3081 (Cal. 1935). Remote preparatory acts reasonably in a chain of causation do not constitute an attempt. Huggins vs. State 41 Ala.App. 548, 142 So.2d 915 cert. denied 273 Ala.708, 145 So.2d 918, (1962). In cases where the actor has gone beyond the line drawn for preparation, indicating primafacie sufficient firmness of purpose, he should be allowed to rebut such a conclusion by showing that he has plainly demonstrated his lack of firm purpose by completely renouncing his purpose to commit the crime. Model Penal Code Commentary, (tentative draft No. 10) Pages 69-73.

Even if there could possibly be an interpretation of the facts which shows an intent to rob, the evidence is clear that there would have been a complete and voluntarily abandonment of any such intent. Even where Defendant has proceeded far towards commission of the contemplated crime, complete and voluntary abandonment should be allowed as a defense to an attempt in order to encourage desistance and to diminish the risk that the substantive crime will be committed. Code of Alabama, 1975, Section 13A-4-2, commentary. The three essential elements of the crime of robbery are: (1) Felonious intent; (2) Force or putting in fear as the means of effecting the intent; and (3) By that means the taking and carrying away of the personal property of another from his person or in his presence, with all three elements occurring in point of time.

Davis vs. State 401 So.2d 187 (Ala. Crim. App.), cert. denied, 401 So.2d 190, (Ala. 1981).

The Defendant in his trial testimony, stated that he had no plan to rob Mr. Hughes, did not take anything out of the cash register and did not bring anything else out of the store (R-325). If in all of the Defendant's confessions which were admitted into evidence, he told in detail about the shooting, then it would seem logical that if he robbed the victim or even intended to rob the victim, that he would freely admit such in his confessions. Yet, he never expressed in any confession admitted as an Exhibit that it was his intention to rob Mr. Hughes.

There is no direct evidence of any theft of property. There is no direct evidence of any robbery. There is only mere speculation that robbery was the motive. The Detectives inquired as to other motives for the killing, such as a hired killing, (R-210) evidently because there was no sign of any robbery or attempted robbery. Indeed, the pertinent facts regarding a lack of a robbery are as follows:

a. Nothing was taken from the store after the shooting.

b. The cash register and the victim's pockets were full of money.

c. No merchandise was missing.

d. No contraband was found on the Defendant or his companion at the time of his arrest.

Speculation or mere suspicion that robbery may have been a motive without any corroborating evidence is not sufficient to support a robbery conviction. Where conviction is sought upon circumstantial evidence, the state has the burden of showing beyond all reasonable doubt to the excusion of every reasonable hypothesis except that of accused's guilt every circumstance necessary to show that accused is guilty. Deal vs. State 13 So.2d 688 (1943). Where evidence raises a mere suspicion, or, admitting all it tends to prove, accused's guilt is left in uncertainty or dependent upon conjuncture or probability, court should instruct jury to acquit. Deal vs. State 13 So.2d 688 (1943). In reviewing the sufficiency of evidence to justify a finding of guilt beyond a reasonable doubt in a circumstantial evidence case, the test the Appellate Court is to apply is whether the jury might reasonably find the evidence excluded every reasonable hypothesis except that of guilty. Clark vs. U.S. 293 F.2d 445, C. A. Ala. (1961). Burden is never on accused to establish innocence, or disprove facts necessary to establish offense charged. Seale vs. State 108 So.2d 271, 21 Ala. App. 351 (1926). The state must prove beyond a reasonable doubt every material ingredient of the crime charged. Piano vs. State 49 So. 803, 161 Ala. 88 (1909). The burden is upon the State, and the State must show beyond all reasonable doubt and to the exclusion

of every other reasonable hypothesis, every circumstance necessary to show that Defendant is guilty and unless the State has done so, a verdict of not guilty should be rendered. Gilbert vs. State 3 So.2d 95, 30 Ala. App. 214 (1941).

ARGUMENT

II.

THE SENTENCE OF DEATH WAS NOT PROPER.

The sentence of death was imposed under the influence of passion and prejudice. The jury was unduly prejudiced by the actions of the victim's widow. Mrs. Hughes was crying and sobbing and jurors were disturbed by her actions (R-36). Over defendant's objections, Mrs. Hughes was allowed to remain in the courtroom to further play upon the passion and prejudice of the jury.

Upon an independent weighing of the aggravating and mitigating circumstances, it is clear that the mitigating circumstances outweigh the aggravating circumstance. The trial court set forth as the sole aggravating circumstance that the capital offense was committed while the defendant was engaged in an attempt to commit a robbery (R-423). However, the State failed to meet its burden of proof as to the robbery (See Argument No. 1). Because the one aggravating circumstance cited by the Court was not supported by the evidence, the mitigating circumstances necessarily outweigh the aggravating circumstance and, therefore, the sentence of death is improper.

The sentence of death in this case is excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

ARGUMENT

III.

THE DEATH PENALTY IS UNCONSTITUTIONAL.

The death penalty is a cruel and unusual punishment prohibited by the 8th and 14th Amendments to the Constitution of the United States. Death as a penalty for a crime is not only excessive, but it is morally unacceptable. Beck vs. Alabama, 447 U.S. 626, 65 L. Ed. 2d, 392, 100 S. Ct. 2382, (1980) (Marshall, J., concurring); Furman vs. Georgia, 408 U.S. 238, 314-374, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972), (Marshall, J. concurring), Gregg vs. Georgia, 428 U.S. 153, 231-241, 449 Lawyers Edition 2d. 859, 96 S. Ct. 2909 (1976) (Marshall, J. dissenting); Godfrey vs. Georgia, 446 U.S. 420, 433-442, 64 Lawyers Ed. 2d. 398 100 S. Ct. 1759 (1980) (Marshall, J. concurring in Judgment).

The law has progressed to the point where the Court should declare that the punishment of death, like punishment on the rack, the screw and the wheel, is no longer morally tolerable in our civilized society. The State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be degrading to human dignity. Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormanlity, but it serves no penal purpose more effectively than a less

severe punishment; therefore, the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment. The death sentence is violatative of the 8th and 14th Amendments. Beck vs. Alabama, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980), (Brennan, J., concurring); Gregg vs. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (Brennan, J. dissenting); Furman vs. Georgia 408 U.S. 238, 237, 33 L. Ed. 2d 346, 92 S. Ct. 2726, (1972) (Brennan, J. concurring).

CONCLUSION

The State of Alabama failed to meet its burden of proof in that it failed to prove beyond a reasonable doubt that the Defendant committed a robbery. Of the many witnesses who testified against the Defendant, not one of them stated that any merchandise was missing from the store, or that any money or other property was taken from the victim or from his possession. There was no stolen property found on the Defendant or his companion at the time of their arrest. In all the many statements made by the Defendant and admitted against him at trial, although he apparently admitted his participation in the shooting, he at all times denied a robbery or attempted robbery. The burden is on the State to show beyond all reasonable doubt and to the exclusion of every other reasonable hypothesis, every circumstance necessary to show that the Defendant is guilty, and unless the State has done so, a verdict of not guilty should be rendered.

The jury was unduly prejudiced by the emotional outburst of the victim's widow, the mitigating circumstances outweighted the aggraviating circumstance and the sentence of death was excessive and disproportionate to the penalty imposed in similar cases.

The death penalty is a cruel and unusual punishment prohibited by the 8th and 14th Amendments to the Constitution of the United States.

The Defendant requests that his conviction in the lower court be reversed.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief upon the Clerk of the Court of Criminal Appeals and to the Attorney General of the State of Alabama, by depositing a copy of the same, postage prepaid, certified mail, return receipt requested and properly addressed to:

Hon. Mollie Jordan
Clerk, Court of Criminal Appeals
P. O. Box 351
Montgomery, Alabama 36101

Hon. Charles Graddick
Attorney General
64 North Union Street
250 Administrative Building
Montgomery, Alabama 36130

This the 14th day of December, 1982.

CORNETT, PERDUE & IVINS

By: James M. Ivins

James M. Ivins
Attorney for Appellant
1408 Broad Street
Post Office Box 88
Phenix City, Alabama 36867
(205) 298-0607

IN THE SUPREME COURT

STATE OF ALABAMA

JOHNNY LUKE,

Appellant

vs.

THE STATE OF ALABAMA,

Appellee

CASE NO._____

BRIEF OF APPELLANT

James M. Ivins
CORNETT, PERDUE & IVINS
P. O. Box 88
1408 Broad St.
Phenix City, Al. 36867

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The Defendant was arrested on July 23, 1982, by the Russell County Sheriff's Deputies for a shooting in Hurtsboro (R-129). The Defendant was indicted by the Russell County Grand Jury on August 25, 1982, on the charge of Murder during Robbery First Degree (429-430). After arraignment and appointment of counsel on September 8, 1982 (434), the Defendant on September 13, 1982, filed a Motion to have case continued, a Motion to Suppress and a Petition for Psychiatric Examination (436-441). On September 13, 1982, the trial court denied Defendant's motion to have the case continued. Although there was a hearing on the Petition for Psychiatric Examination (444), there is no record of the proceeding included in the record on appeal. The Trial Court denied Defendant's Petition for Psychiatric Examination on September 28, 1982. (444). The hearing on the Motion to Suppress was continued until the date of trial.

The jury trial of the case was held on September 29, 1982, and September 30, 1982, with the jury returning a verdict of guilty of Murder during Robbery in the First Degree (462). The Defendant waived the participation of the jury in the sentence hearing ($-401) which was held on October 1, 1982, (R-404-416). A presentence hearing was held on October 26, 1982 (R-417-420). Sentencing was held on October 29, 1982, (R-421) wherein the Defendant was sentenced to death by the Trial Court (R-425). There was automatic appeal to the Court of Criminal Appeals (484).

The Court of Criminal Appeals affirmed Petitioner's conviction on March 1, 1983. An application for rehearing was filed on March 14, 1983, and overruled on March 29, 1983.

STATEMENT OF THE ISSUES PRESENTED

ARGUMENT I. THE STATE FAILED TO MEET ITS BURDEN OF PROOF AS TO A ROBBERY AND THE COURT OF CRIMINAL APPEALS FAILED TO RECOGNIZE AND FOLLOW THE ALABAMA LEGAL PRECEDENTS IN THIS ISSUE.

Code of Alabama, 1975, Section 13A-8-41.

Davis vs. State 401 So.2d 187 (Ala. Crim. App), cert. denied, 401 So.2d 190, (Ala. 1981).

Ala. Crim. Code, Offenses Involving Theft, Section 13A -8-80 through 13A -8-44, commentary

Code of Alabama, Section 13A-4-2 (1975)

People vs. Miller 42 P.2d 3081 (Cal. 1935).

Huggins vs. State 41 Ala. App. 548, 142 So.2d 915 cert. denied 272 Ala. 708, 145 So.2d 918, (1962).

Model Penal Code Commentary, (tentative draft No. 10) Pages 69-73.

Code of Alabama, 1975, Section 13A-4-2, commentary.

Deal vs. State 13 So.2d 688 (1943).

Clark vs. U.S. 293 F.2d 445, C. A. Ala. (1961).

Seale vs. State 108 So.2d 271, 21 Ala. App. 351 (1926).

Piano vs. State 49 So. 803, 161 Ala. 38 (1909).

Gilbert vs. State 3 So.2d 95, 30 Ala. App. 214 (1941).

ARGUMENT III. THE DEATH PENALTY IS UNCONSTITUTIONAL.

Beck vs. Alabama, 447 U.S. 626, 65 L. Ed. 2d 100 S. Ct. 2382, 1980 (Marshall, J., concurring

Furman vs. Georgia, 308 U.S. 238, 314-374, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1974), (Marshall J. Concurring)

Gregg vs. Georgia, 428 U.S. 153, 231-241, 449 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (Marshall, J. Dissenting)

Godfrey vs. Georgia, 446 U.S. 420, 433-442, 64 L. Ed. 2d 398 100 S. Ct. 1759. (1980) (Marshall, J. concurring in Judgment)

Beck vs Alabama, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980), (Brennan, J. concurring)

Gregg vs. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (Brennan, J. dissenting)

Furman vs. Georgia, 408 U.S. 238, 237, 33 L. Ed. 2d 346, 92 S. Ct. 2727, (1972) (Brennan, J. concurring)

Constitution of the United States, Amendments 8 and 14.

Code of Alabama, 1975, Section 13A-4-2

STATEMENT OF THE FACTS

On July 23, 1982, at approximately 8:30 a.m., the Defendant and his companion George Warren loaded some watermelons in rural Russell County, Alabama (R-82). Later that same day, at approximately 1:30 p.m., the two travelled to the store of James T. Hughes, in Hurtsboro, Russell County, Alabama. They both entered the store and Warren bought and paid for some beer. While they were there alone with Mr. Hughes, he was fatally shot four times with a .38 caliber revolver (R-100).

No money or merchandise was stolen from the victim or his store by either the Defendant or his companion (R-272). The two left the premises in Warren's pick-up truck, and after switching vehicles with Warren's girlfriend, they were arrested by Deputies of the Russell County Sheriff's Department (R-130) in connection with the shooting (R-129).

ARGUMENT

I.

THE STATE FAILED TO MEET ITS BURDEN OF PROOF AS TO A ROBBERY AND THE COURT OF CRIMINAL APPEALS FAILED TO RECOGNIZE AND FOLLOW THE ALABAMA LEGAL PRECEDENTS IN THIS ISSUE.

The Defendant was charged in the indictment with causing the death of James T. Hughes while in the course of committing a theft of property from Mr. Hughes (429). The underlying charge is Robbery in the First Degree. Section 13A-8-41 Code of Alabama, 1975. In order for the Defendant to have been properly convicted as charged in the indictment, the burden of proof was on the state to show that a robbery had been committed. As disclosed by the record, this they were unable to do beyond a reasonable doubt. The three essential elements of the crime of robbery are: (1) Felonious intent; (2) Force or putting in fear as the means of effecting the intent; and (3) By that means the taking and carrying away of the personal property of another from his person or in his presence, with all three elements occurring in point of time. Davis vs. State 401 So.2d 187 (Ala.Crim. App.), cert. denied, 401 So.2d 190, (Ala. 1981).

Richard L. Roynon, Chief of Police of Hurtsboro, had no knowledge of anything being taken from the store (R-44).

George Chambliss, a customer at the store who had left just prior to the shooting (R-65) and who returned just after the shooting (R-71) did not remember if the cash register was open or closed (R-72).

John T. Smith, one of the first witnesses on the scene after the shooting (R-47), stated that no merchandise was disturbed, that he could not say that anything had been taken (R-52).

Thomas F. Boswell, Russell County Sheriff's Department did not know if any money was removed from Mr. Hughes' store (R-264) and could not testify that anything from the store was taken by the Defendant or his companion (R-272). Captain Boswell further stated that the Defendant denied taking any money from the cash register (R-278).

Joseph Michael Brundrick, one of the arresting officers (R-146), could not identify any property found on the Defendant as being taken from Mr. Hughes' store (R-148).

Herbert L. Parker, Russell County Sheriff's Department, could not identify any property that was seized from the Defendant as being from the store (R-233).

The Defendant, on the tape that was entered into evidence as State's Exhibit No. 25-A, stated that his companion, George Warren, actually paid for a purchase at the store (R-189), and that they did not take any other property from Mr. Hughes' store

(R-191). In addition, the Defendant in a statement marked as State's Exhibit 24, when asked if he got any money out of the register or off of Mr. Hughes' body, replied "no, I didn't" (R-295).

Raymond B. Smith, Russell County Sheriff's Department, testified that after the shooting Mr. Hughes had $150.00 in cash in his wallet and $23.69 in his front pocket (R-282). Officer Smith further testified that there was an additional $655.98 in the cash register after the shooting (R-284).

The Defendant in his statement marked as State's Exhibit No. 23, stated that he did not intend to rob Mr. Hughes, he just pulled the pistol and shot him (R-256). The violence used or threatened must be for the purpose of accomplishing a theft. Violence used or threatened for some purpose unrelated to theft is a separate offense against the person. Ala. Crim. Code, Offenses Involving Theft, Section 13A -8-80 through 13A -8-44, commentary. There was no intent to commit robbery as per the 1975 Code of Alabama, Section 13A-4-2, so the only intent that could be reasonably argued would be the shooting.

There is no evidence of any plan or scheme to commit any robbery before the shooting, nor any evidence of any theft after the shooting. The victim was alone in his store, and after he became incapacitated, there were no intervening circumstances to prevent the Defendant from committing a theft if that had been his intention. In order to be guilty of the underlying charge by way of an attempt, the attempt must be in such progress that it

will be consumated unless interrupted by circumstances independent of the will of the attempter. People vs. Miller 42 P.2d 3081 (Cal. 1935). Remote preparatory acts reasonably in a chain of causation do not constitute an attempt. Huggins vs. State 41 Ala.App. 548, 142 So.2d 915 cert. denied 273 Ala.708, 145 So.2d 918, (1962). In cases where the actor has gone beyond the line drawn for preparation, indicating primafacie sufficient firmness of purpose, he should be allowed to rebut such a conclusion by showing that he has plainly demonstrated his lack of firm purpose by completely renouncing his purpose to commit the crime. Model Penal Code Commentary, (tentative draft No. 10) Pages 69-73.

Even if there could possibly be an interpretation of the facts which shows an intent to rob, the evidence is clear that there would have been a complete and voluntarily abandonment of any such intent. Even where Defendant has proceeded far towards commission of the contemplated crime, complete and voluntary abandonment should be allowed as a defense to an attempt in order to encourage desistance and to diminish the risk that the substantive crime will be committed. Code of Alabama, 1975, Section 13A-4-2, commentary. The three essential elements of the crime of robbery are: (1) Felonious intent; (2) Force or putting in fear as the means of effecting the intent; and (3) By that means the taking and carrying away of the personal property of another from his person or in his presence, with all three elements occurring in point of time.

Davis vs. State 401 So.2d 187 (Ala. Crim. App.), cert. denied, 401 So.2d 190, (Ala. 1981).

The Defendant in his trial testimony, stated that he had no plan to rob Mr. Hughes, did not take anything out of the cash register and did not bring anything else out of the store (R-325). If in all of the Defendant's confessions which were admitted into evidence, he told in detail about the shooting, then it would seem logical that if he robbed the victim or even intended to rob the victim, that he would freely admit such in his confessions. Yet, he never expressed in any confession admitted as an Exhibit that it was his intention to rob Mr. Hughes.

There is no direct evidence of any theft of property. There is no direct evidence of any robbery. There is only mere speculation that robbery was the motive. The Detectives inquired as to other motives for the killing, such as a hired killing, (R-210) evidently because there was no sign of any robbery or attempted robbery. Indeed, the pertinent facts regarding a lack of a robbery are as follows:

a. Nothing was taken from the store after the shooting.

b. The cash register and the victim's pockets were full of money.

c. No merchandise was missing.

d. No contraband was found on the Defendant or his companion at the time of his arrest.

Speculation or mere suspicion that robbery may have been a motive without any corroborating evidence is not sufficient to support a robbery conviction. Where conviction is sought upon circumstantial evidence, the state has the burden of showing beyond all reasonable doubt to the excusion of every reasonable hypothesis except that of accused's guilt every circumstance necessary to show that accused is guilty. Deal vs. State 13 So.2d 688 (1943). Where evidence raises a mere suspicion, or, admitting all it tends to prove, accused's guilt is left in uncertainty or dependent upon conjuncture or probability, court should instruct jury to acquit. Deal vs. State 13 So.2d 688 (1943). In reviewing the sufficiency of evidence to justify a finding of guilt beyond a reasonable doubt in a circumstantial evidence case, the test the Appellate Court is to apply is whether the jury might reasonably find the evidence excluded every reasonable hypothesis except that of guilty. Clark vs. U.S. 293 F.2d 445, C. A. Ala. (1961). Burden is never on accused to establish innocence, or disprove facts necessary to establish offense charged. Seale vs. State 108 So.2d 271, 21 Ala. App. 351 (1926). The state must prove beyond a reasonable doubt every material ingredient of the crime charged. Piano vs. State 49 So. 803, 161 Ala. 88 (1909). The burden is upon the State, and the State must show beyond all reasonable doubt and to the exclusion

of every other reasonable hypothesis, every circumstance necessary to show that Defendant is guilty and unless the State has done so, a verdict of not guilty should be rendered. Gilbert vs. State 3 So.2d 95, 30 Ala. App. 214 (1941).

The facts do not support a conviction of a capital offense. There is no direct evidence of a theft of property from the victim. There was also no direct evidence that the victim was shot "in the course of commiting a theft" as defined by the statute.

The trial court made a "finding the fact" which was adopted by the Court of Criminal Appeals. The Trail Court's finding of fact was not correct and should not be used as the basis of affirming appellant's conviction. Determining the facts is a function for the jury. The Appellate Court has a duty to review the facts by examining the record of the trial proceedings and not by merely adopting the trial court's rendition of the evidence.

ARGUMENT

II.

THE SENTENCE OF DEATH WAS NOT PROPER AND THE APPELLATE COURT ERRED IN REFUSING TO OVERTURN THE CONVICTION.

The sentence of death was imposed under the influence of passion and prejudice. The Jury and the Judge were both unduly prejudiced by the actions of the victim's widow. Mrs. Hughes was crying and sobbing and the jurors and the Court were disturbed by her actions (R-36). Over Defendant's objections, Mrs. Hughes was allowed to remain in the Courtroom to further play upon the passion and prejudice of the Jury and of the Court.

Upon an independent weighing of the aggravating and mitigating circumstances, it is clear that the mitigating circumstances outweigh the aggravating circumstance. The trial court set forth as the sole aggravating circumstance that the capital offense was committed while the defendant was engaged in an attempt to commit a robbery (R-423). However, the State failed to meet its burden of proof as to the robbery (See Argument No. 1). Because the one aggravating circumstance cited by the Court was not supported by the evidence, the mitigating circumstances necessarily outweigh the aggravating circumstance and, therefore, the sentence of death is improper.

The sentence of death in this case is excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

ARGUMENT

III.

THE DEATH PENALTY IS UNCONSTITUTIONAL.

The death penalty is a cruel and unusual punishment prohibited by the 8th and 14th Amendments to the Constitution of the United States. Death as a penalty for a crime is not only excessive, but it is morally unacceptable. Beck vs. Alabama, 447 U.S. 626, 65 L. Ed. 2d, 392, 100 S. Ct. 2382, (1980) (Marshall, J., concurring); Furman vs. Georgia, 408 U.S. 238, 314-374, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972), (Marshall, J. concurring), Gregg vs. Georgia, 428 U.S. 153, 231-241, 449 Lawyers Edition 2d. 859, 96 S. Ct. 2909 (1976) (Marshall, J. dissenting); Godfrey vs. Georgia, 446 U.S. 420, 433-442, 64 Lawyers Ed. 2d. 398 100 S. Ct. 1759 (1980) (Marshall, J. concurring in Judgment).

The law has progressed to the point where the Court should declare that the punishment of death, like punishment on the rack, the screw and the wheel, is no longer morally tolerable in our civilized society. The State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be degrading to human dignity. Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormanlity, but it serves no penal purpose more effectively than a less

severe punishment; therefore, the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment. The death sentence is violatative of the 8th and 14th Amendments. Beck vs. Alabama, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980), (Brennan, J., concurring); Gregg vs. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (Brennan, J. dissenting); Furman vs. Georgia 408 U.S. 238, 237, 33 L. Ed. 2d 346, 92 S. Ct. 2726, (1972) (Brennan, J. concurring).

The Code of Alabama, 1975, Section 13A-4-2 directs a lesser punishment for an attempt than for the commission of the uncompleted underlying charge. Assuming that the underlying charge was a Class A Felony, then punishment for an attempt thereof could not be greater than a Class B Felony, or 2 to 20 years. In effect, the Appellant has been sentenced to death for a charge that would ordinarily be punishable for a term not to exceed 20 years. Therefore, in this case, the death penalty is a cruel and unusual punishment prohibited by the 8th and 14th Amendments to the Constitution of the United States.

CONCLUSION

The State of Alabama failed to meet its burden of proof in that it failed to prove beyond a reasonable doubt that the Defendant committed a robbery. Of the many witnesses who testified against the Defendant, not one of them stated that any merchandise was missing from the store, or that any money or other property was taken from the victim or from his possession. There was no stolen property found on the Defendant or his companion at the time of their arrest. In all the many statements made by the Defendant and admitted against him at trial, although he apparently admitted his participation in the shooting, he at all times denied a robbery or attempted robbery. The burden is on the State to show beyond all reasonable doubt and to the exclusion of every other reasonable hypothesis, every circumstance necessary to show that the Defendant is guilty, and unless the State has done so, a verdict of not guilty should be rendered.

The Jury and the Trial Court were both unduly prejudiced by the emotional outburst of the victim's widow, the mitigating circumstances outweighted the aggravating circumstnace and the sentence of death was excessive and disproportionate to the penalty imposed in similar cases.

The death penalty is a cruel and unusual punishment prohibited by the 8th and 14th Amendments to the Constitution of the United States.

The Defendant requests that his conviction in the lower court be reversed.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief upon the Supreme Court, State of Alabama, Clerk of Criminal Appeals and to the Attorney General of the State of Alabama, by depositing a copy of same, postage prepaid, certified mail, return receipt requested and properly addressed to:

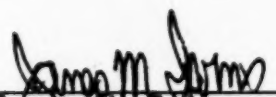
Hon. J. O. Sentell, Clerk
Supreme Court of Alabama
Post Office Box 157
Montgomery, Alabama 36101

Hon. Mollie Jordan
Clerk, Court of Criminal Appeals
Post Office Box 351
Montgomery, Alabama 36101

Hon. Charles Graddick
Attorney General
64 North Union Street
250 Administrative Building
Montgomery, Alabama 36130

This the 31st day of March, 1983.

CORNETT, PERDUE & IVINS

By: 

James M. Ivins
Attorney for Appellant
1408 Broad Street
Post Office Box 88
Phenix City, Alabama 36867
(205) 298-0607